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May 16, 1996

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-98

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of Bell Atlantic NYNEX Mobile, Inc. are an original and twelve copies of its "Comments" on the Notice of Proposed Rulemaking in the above-referenced proceeding. In accordance with the Notice, a copy of these comments is also being submitted on diskette to Ms. Janice Myles of the Common Carrier Bureau.

Should there be any questions regarding these Comments, please contact this office.

Very truly yours,

John T. Scott, III

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

COMMENTS OF BELL ATLANTIC NYNEX MOBILE, INC.

Bell Atlantic NYNEX Mobile, Inc. (BANM),[1] by its attorneys, submits these Comments on the Commission's Notice of Proposed Rulemaking in this proceeding (FCC 96-182, released April 19, 1996). While the Notice focuses on the inter-connection obligations of landline carriers in the local exchange market, it raises several issues that directly impact BANM and other providers of commercial mobile radio services (CMRS). BANM's comments address these issues.

I. CMRS PROVIDERS ARE NOT LECS AND SHOULD NOT BE RECLASSIFIED AS LECS FOR ANY OF THEIR SERVICES.

Section 251 of the Telecommunications Act of 1996 ("1996 Act") imposes specific interconnection and other obligations on "local exchange carriers" (Section 251(b)) and on "incumbent local exchange carriers" (Section 251(c)). The Notice (at ¶ 195) seeks comment "on whether, and to what extent, CMRS providers should be classified as LECs and the criteria, such as wireless local loop competition in the

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[1]Bell Atlantic NYNEX Mobile, Inc. is the managing general partner of Cellco Partnership, which holds or controls cellular radiotelephone licenses to provide service to more than 80 cellular markets throughout the United States.

LEC's service area by the CMRS provider, that we should use to make such a determination."

The Commission should confirm that CMRS providers are not "local exchange carriers" in the provision of any of their services. Both the 1993 and 1996 amendments to the Communications Act, their legislative history, and the public interest benefits of continuing limited regulation of CMRS all mandate that CMRS providers not be reclassified as LECs.

First, the 1993 amendments which Congress made to Section 332[2] created a system of limited regulation of CMRS, based on Congress's determination that minimal regulation was in the public interest because it would promote vigorous competition, enhance service and stimulate innovation.[3] CMRS providers, unlike LECs, were not to be subjected to any rate or entry regulation by the states. In numerous proceedings implementing the 1993 amendments, the Commission has noted the many benefits of not subjecting CMRS providers to LEC-type regulation. It forbore from any LEC-type regulation at a federal level,[4] and preempted the requests of eight states to continue such regulation.[5] Reclassifying CMRS

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[2]Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b)(2).

[3]See, e.g., H. Rep. No. 103-111, 103d Cong., 1st Sess. 259-60 (1993); H. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 494 (1993).

[4]Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411 (1994).

[5]See, e.g., Petition of the Connecticut Dep't of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, 10 FCC Rcd. 7025 (1995).

providers as LECs for any of their services would frustrate the clear language and intent of Section 332, potentially lead to state efforts to reassert jurisdiction over CMRS based on the claim that CMRS carriers were now "LECs", contradict the Commission's own decisions implementing Section 332, and undermine the public interest policies on which they were grounded.

Second, the definition of "local exchange carrier" in Section 3(44) of the 1996 Act, enacted barely three months ago, states that CMRS providers are excluded from the scope of that term. To now reverse the policy choice which Congress just made would countermand Congress' intent. The legislative history of the 1996 Act clearly indicates that Congress did not contemplate that CMRS carriers would be classified as LECs in the same proceedings that implemented the Act. To the contrary, Congress merely gave the Commission the authority to do so, but only at some future time. The Conference Report explains:

> The Senate definition of "local exchange carrier" was included to ensure that the Commission could, if future circumstances warrant, include CMS providers which provide telephone exchange service or exchange access in the definition of "local exchange carrier."[6]

The Conference Committee recognized that, as telecommunications technologies evolve, CMRS providers could, in the future, provide service that might be comparable in scope to that currently provided by landline LECs, and that the Commission should have the discretion, if that occurred, to treat CMRS

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[6]S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 116 (1995) (emphasis added).

providers of that service as LECs. But it did not intend that the Commission treat CMRS carriers as LECs at this time. Doing so would undermine the thrust of both of Congress's recent revisions of the Communications Act. The 1996 Act confirms and continues that approach by excluding CMRS from various regulatory obligations (including Section 251) which apply only to local exchange carriers.

Third, the Commission has itself tentatively concluded in the pending "flexible service" rulemaking that subjecting CMRS providers to the additional level of regulation required of LECs may frustrate the development of CMRS.[7] The record in that proceeding provided extensive support for the Commission's conclusion, and confirmed the public interest benefits in continuing limited regulation of CMRS. That record provides additional reason not to undermine those public interest benefits by subjecting CMRS providers to LEC regulation.

The House bill which was incorporated in part into the 1996 Act provided that the term "local exchange carrier" does not include a CMRS provider "except to the extent that the Commission finds that such service as provided by such person in a State is a replacement for a substantial portion of the wireline telephone exchange service within such State."[8] This language was drawn directly from Congress' 1993 revisions to Section 332, which reflected Congress's judgment that

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[7]Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, Notice of Proposed Rulemaking (FCC 96-17, released January 25, 1996).

[8]H.R. 1555, Sec. 501(a)(44).

CMRS should not be subject to LEC-type regulation until it substantially replaced landline service. The final 1996 Act left it to the Commission to determine when to regulate a CMRS provider as a LEC. The House bill's test remains the correct approach, because only when a CMRS provider achieves such a position in the market for local telecommunications services would subjecting it to LEC-type regulation be warranted. In the CMRS market today, no CMRS provider holds such a position; and, as the Commission has repeatedly recognized, the CMRS market is itself increasingly competitive.[9]

Given the language of Sections 332 and new Section 3(44) of the Communications Act, and the Commission's own actions as to CMRS, there would be no legal basis to define a CMRS provider as a LEC other than in the limited situation set forth in Section 332. If the Commission believes it necessary to adopt a rule implementing the definition of LEC at this time, BANM thus recommends that the Commission include in any such rule the following language:

> A "local exchange carrier" shall not include a provider of commercial mobile radio services except to the extent that the Commission finds that such service as provided by such person in a state is a replacement for a substantial portion of the wireline telephone exchange service within such State.

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[9]See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd. 7988 (1994).

II. CMRS PROVIDERS HAVE NO OBLIGATIONS UNDER SECTIONS 251(B) AND (C).

Sections 251(b) and (c) of the 1996 Act impose duties on "local exchange carriers" and "incumbent local exchange carriers" respectively. The Notice (at ¶ 167) tentatively concludes that CMRS providers are not subject to the interconnection obligations of Section 252(c)(2), because they are not "incumbent" LECs. This is correct. CMRS providers are explicitly excluded from the definition of "local exchange carrier" (Section 3(44)), and in addition are not "incumbent" LECs under the definition of that term in Section 251(h).[10] Incumbent LECs are the only type of carrier subject to Section 251(c)(2)'s interconnection duties.

The Notice does not address whether CMRS providers have obligations under other subsections of Section 251(c), or under Section 251(b), but the same analysis the Commission follows as to Section 251(c)(2) applies to these provisions as well. CMRS providers are neither incumbent LECs nor (as demonstrated in Part I of BANM's Comments) LECs. The Commission should thus declare that CMRS providers are not subject to any of the obligations of Sections 251(b) and (c).

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[10]Section 251(h)(1) limits "incumbent LECs" to LECs which, on the date of enactment of the 1996 Act, provided "telephone exchange service" and were "deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations." This excludes CMRS providers. Section 251(h)(2) allows certain LECs to be treated as incumbent LECs where, among other requirements, "such carrier has substantially replaced an incumbent local exchange carrier." Again, this would not cover any CMRS providers. Thus, even were a CMRS carrier deemed to be a LEC (which, as discussed in Part I, supra, it is not), it could not be found to be an incumbent LEC.

III. CMRS PROVIDERS ARE ENTITLED TO RECIPROCAL COMPENSATION AND TO INTERCONNECTION.

The Notice (at ¶¶ 166-69) also asks for comment on the application of Section 251 of the 1996 Act to CMRS providers. The Commission has already received exhaustive comments on this issue in CC Docket No. 95-185, and is considering specific rules governing LEC-CMRS compensation in that docket.[11]

As BANM and many other commenters demonstrated in CC Docket No. 95-185, CMRS providers which seek to exchange their traffic with LECs clearly have interconnection and mutual compensation rights arising out of various provisions in the Communications Act. Those provisions establish the rights of wireless carriers to reach voluntary agreement on the price and terms of two-way interconnection and compensation.[12] Other than adopt rules implementing the language of Section 251, the Commission thus need not take further action. It has already declared that CMRS providers have both the right to compensation and the right to interconnect. In 1994, the Commission expanded its longstanding

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[11]Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Notice of Proposed Rulemaking (FCC 95-505, released January 11, 1996), Comments of Bell Atlantic NYNEX Mobile, Inc., at 9-14. BANM recommended that the Commission declare that: (1) a LEC has the duty to negotiate in good faith; (2) a CMRS provider is entitled to compensation on non-discriminatory terms; (3) LEC rates must be based on costs, (4) rates must be reciprocal, and (5) symmetrical rates are acceptable and consistent with the Communications Act.

[12]As noted in Part I of these Comments, supra at 1-5, the fact that a CMRS provider is entitled to interconnection and mutual compensation does not make it a "local exchange carrier."

policies, which granted cellular and certain other mobile carriers interconnection rights, to include all CMRS providers, and codified those rights into its CMRS rules.[13] It directed that LECs must negotiate in good faith with CMRS providers to achieve reasonable, non-discriminatory interconnection:

> The Commission will require LECs to provide reasonable and fair interconnection for all commercial mobile radio services. . . . The LEC shall not have authority to deny to a CMRS provider any form of interconnection arrangement that the LEC makes available to any other carrier or other customer.[14]

The Commission also plainly stated that the interconnection rights of CMRS providers included the right to mutual compensation:

> In providing reasonable interconnection to CMRS providers, LECs shall be subject to the following requirements. First, the principle of mutual compensation shall apply, under which LECs shall compensate CMRS providers for the reasonable costs incurred by such providers in terminating traffic that originates on LEC facilities.[15]

Section 251 codifies and builds on the rights to mutual compensation that the Commission previously established pursuant to Section 201 of the 1934 Act. This conclusion is confirmed by Section 251(i), which states, "Nothing in this section shall be construed to limit or otherwise affect the Commission's authority

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[13]47 CFR § 20.11 ("Interconnection to facilities of local exchange carriers").

[14]Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1498 (1994).

[15]Id.

under section 201."[16] The CMRS-LEC negotiation process that Section 251 mandates is already underway.

It is nonetheless critical that the Commission act promptly to preempt state-imposed compensation schemes which are inconsistent with the 1996 Act. As BANM demonstrated in its Comments in CC Docket No. 95-185 (Comments at 19-22), the public service commission in Connecticut has required CMRS providers to obtain "certification" as a "competitive local exchange carrier," as a precondition to obtaining any compensation from the LEC serving Connecticut. This scheme clearly violates Sections 251 and 253 of the 1996 Act and Section 332 of the 1934 Act by imposing entry regulation, and it and any similar state schemes that attempt to impose LEC-type regulation on CMRS providers should be declared illegal.[17]

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[16]See also Conf. Rep. at 123: "New subsection 251(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection under section 201 of the Communications Act."

[17]Unlawful state efforts to reregulate CMRS through the imposition of "certification" and other requirements underline the importance of a clear declaration by the Commission in this proceeding that CMRS providers are not LECs and will not be reclassified as such (supra at 1-5).

IV. CONCLUSION

For the reasons set forth above and in BANM's Comments in CC Docket No. 95-185, the Commission should (1) confirm that CMRS providers are not LECs and will not be classified as such in their provision of commercial mobile services; (2) confirm that CMRS providers are not subject to the obligations of Sections 251(b) or (c) of the 1996 Act; (3) adopt rules implementing Section 251, and (4) preempt state actions which are in violation of the 1996 Act.

Respectfully submitted,

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Dated: May 16, 1996